IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1957

No. 549

VETO GIORDENELLO,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

BRIEF FOR THE PETITIONER

WILLIAM F. WALSH
Counsel for Petitioner
1116 Capitol Avenue
Houston 2, Texas

INDEX

SUBJECT INDEX

AUTHORITIES

JUDICIAL DECISIONS:

CONSTITUTIONAL PROVISIONS:

Page

RULES OF CRIMINAL PROCEDURE:

UNITED STATES CODE:

MISCELLANEOUS:

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1957

No. 549

VETO GIORDENELLO,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE PETITIONER

Opinion Below

The District Court did not render an opinion. The opinion of the Court of Appeals, affirming this conviction by a divided panel (R. 59-77), is reported at 241 F.2d 575.

Jurisdiction

The opinion (R. 59) and judgment (R. 78) of the Court of Appeals are dated January 31, 1957; a petition for rehearing (R. 78), timely filed, was denied May 17, 1957 (R. 79).

The petition for a writ of certiorari, filed June 5, 1957, was granted October 14, 1957. The jurisdiction of this Court is invoked under Section 1254(1) of the Judicial Code.

Constitutional Provisions and Rules of Criminal Procedure Involved

The United States Constitution, Article III, Section 1, provides in pertinent part:

> "The judicial power of the United States shall be vested in one Supreme Court, and in such inferior courts as the Congress may from time to time ordain and establish."

The Fourth Amendment to the United States Constitution provides:

> "The right of the people to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the person or things to be seized."

The Fifth Amendment to the United States Constitution provides in pertinent part:

> "... nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb ..."

The Sixth Amendment to the United States Constitution provides in pertinent part that:

> "In all criminal prosecutions, the accused shall enjoy the right ... to have the Assistance of Counsel for his defense."

The Eighth Amendment to the United States Constitution provides in pertinent part that:

"Excessive bail shall not be required . . ."

Rule 2 of the Federal Rules of Criminal Procedure provides:

"These rules are intended to provide for the just determination of every criminal proceeding. They shall be construed to secure simplicity in procedure, fairness in administration and the elimination of unjustifiable expense and delay."

Rule 3 of the Federal Rules of Criminal Procedure provides:

"The complaint is a written statement of the essential facts constituting the offense charged. It shall be made upon oath before a commissioner or other officer empowered to commit persons charged with offenses against the United States."

Rule 4(a) of the Federal Rules of Criminal Procedure provides in pertinent part:

"If it appears from the complaint that there is probable cause to believe that an offense has been committed and that the defendant has committed it, a warrant for the arrest of the defendant shall issue to any officer authorized by law to execute it."

Rule 41(e) of the Federal Rules of Criminal Procedure provides:

"A person aggrieved by an unlawful search and seizure may move the district court for the district in which the property was seized for the return of the property and to suppress for use as evidence anything so obtained on

the ground that (1) the property was illegally seized without warrant, or (2) the warrant is insufficient on its face, or (3) the property seized is not that described in the warrant, or (4) there was not probable cause for believing the existence of the grounds on which the warrant was issued, or (5) the warrant was illegally executed. The judge shall receive evidence on any issue of fact necessary to the decision of the motion. If the motion is granted the property shall be restored unless otherwise subject to lawful detention and it shall not be admissible in evidence at any hearing or trial. The motion to suppress evidence may also be made in the district where the trial is to be had. The motion shall be made before trial or hearing unless opportunity therefor did not exist or the defendant was not aware of the grounds for the motion, but the court in its discretion may entertain the motion at the trial or hearing."

Questions Presented

I.

A narcotics agent, who had no personal knowledge that petitioner committed any crime, swore to a complaint which stated no evidentiary facts. He obtained an arrest warrant from a United States Commissioner and carried it for two days as an "investigative technique" while following the petitioner. He then searched petitioner during an arrest under the warrant.

Is this search reasonable within the meaning of the Fourth Amendment to the United States Constitution?

II.

Arrested for one offense, petitioner waived preliminary hearing before the United States Commissioner. Indicted for a different offense, he moved to suppress the evidence seized during his arrest. The Court of Appeals held that he waived his right to suppress the evidence when he waived preliminary hearing.

Did petitioner forfeit all opportunity to exercise his constitutional rights against unreasonable searches when he waived preliminary examination as to an offense for which he has not been indicted to this day?

Statement of the Case

A. The Form of the Complaint and Warrant

Petitioner was arrested on January 27, 1956, in Houston, Texas, by William T. Finley (R. 19, 31), "an enforcement agent for the United States Treasury Department, Federal Bureau of Narcotics" (R. 15, 30). Mr. Finley testified that he was executing an arrest warrant (R. 20, 21, 24) and that he found a quantity of heroin in a paper bag in petitioner's hand at the time of the arrest (R. 26).

Petitioner moved the trial court to suppress the heroin as evidence (R. 2), claiming that the search of his person was unlawful. At a pre-trial hearing on the motion (R. 4-27), he introduced the warrant (Ex. 2, R. 11) and the complaint upon which the warrant was based (Ex. 3, R. 13).

The complaint alleged only that on January 26, 1956, the petitioner ". . . did receive, conceal, etc., narcotic drugs, to-wit: heroin hydrochloride, with knowledge of unlawful importation; in violation of Section 174, Title 21, United States Code" (Ex. 3, R. 13). No material witnesses were listed on the complaint, which was sworn to before the U. S. Commissioner by Mr. Finley alone (R. 13).

The warrant was addressed, "To U. S. Marshal or any other authorized officer" (R. 11). Although the return was signed by a female Deputy United States Marshal (R. 12), the evidence clearly establishes that the warrant was actually executed by Mr. Finley. There is no contention that the U. S. Marshal or any of his deputies had anything to do with this arrest.

B. The Extent of Complainant's Knowledge of the Facts

Although Mr. Finley, ". . . had kept a surveillance on this man beginning the latter days of December" (R. 18) or since

"before Christmas" (R. 22), Mr. Finley "hadn't seen Giordenello with narcotics in his possession" (R. 17) and had not "seen him receive or conceal any heroin hydrochloride" (R. 16).

When asked, ". . . from the time the investigation began until the 27th or 26th day of January, you never saw Veto Giordenello violate any of the laws of the United States of America, did you?", Mr. Finley replied, "Not that I am prepared to prove now, no sir." (R. 22).

Mr. Finley claimed that he had received "information" from "More than two sources" (R. 17-18), including "other law enforcement officers" (R. 18), ". . . whereby it would indicate that Giordenello was in possession of the heroin at the time I swore to it" (R. 18). He said that these persons were residents of Houston, but that "it didn't enter my mind whether they were available to swear before the Commissioner or not", and that he did not obtain affidavits from them (R. 19). He explained, "I swore to the complaint myself on the basis of their information" (R. 18).

Mr. Finley would not establish a clear distinction between what he had seen and what he had heard from others. He said:

> "I had kept a surveillance on this man beginning the latter days of December, as I said before, and was in possession of information which corroborated my surveillance, and vice versa my surveillance corroborated my information that he was in Houston, and planned to go to Chicago, Illinois, to bring back a large supply of heroin, and he did leave, and he did return, and my surveillance did corroborate that information. In addition to that, I received information from other law enforcement officers that he was in town with that large quantity of heroin" (R. 18).

When the defense endeavored to separate Mr. Finley's knowledge from his information, the U. S. Attorney objected to leading questions (R. 16, 20, 21, 23) and made it clear that he considered Mr. Finley to be the defense's "own witness" (R. 16) "however adverse the proceedings might be" (R. 20). The trial judge sustained such objections (R. 16, 21).

Denied the right to use the techniques of cross-examination at the pre-trial hearing, the defense was also denied the right to cross-examine Mr. Finley at the trial itself. The U. S. Attorney objected to questions about the arrest ". . . in that (th)is has already been gone over in the previous motion, going to the validity of the complaint" (R. 42). The judge sustained the objection and said, "We can go forward on the facts. That is the matter we heard last Friday" (R. 42).

C. The Execution of the Warrant

With regard to the actual arrest, Mr. Finley told the court that, "The warrant was issued on the 26th, it was effective on the 26th, and I saw him after the warrant was issued" (R. 23).

At about 6 p.m., January 27th, 1956, Mr. Finley saw petitioner "in the area of 2901 Airline Drive, Houston, Texas" (R. 21). Mr. Finley had his warrant at that time too, but made no arrest (R. 21). Asked whether anyone kept him from executing the warrant, Mr. Finley replied, "I kept myself from it" (R. 21). He admitted that he could have placed petitioner under arrest at that time (R. 22).

Later, Mr. Finley went to 6827 Brownsville Street, saw petitioner, and executed the warrant of arrest (R. 24), seizing from petitioner a bag containing a substance (R. 26) later identified by a government chemist as less than an ounce of heroin mixed with five ounces of some other substance (R. 50).

Mr. Finley denied that he obtained the warrant so that he would have a chance to search the petitioner at an opportune time (R. 23). He explained that, "there wasn't any particular reason to arrest the man at any particular moment or time after getting the warrant" and that the execution of the warrant "... was an investigative technique on my own. It was a decision I made myself" (R. 22).

D. The Preliminary Hearing, Indictment, Trial and the Opinion of the Court of Appeals

The U. S. Commissioner's records reflect that on the day after the arrest, petitioner appeared with counsel, waived preliminary examination, and was held for the District Court in $25,000.00 bond (Ex. 1, R. 9). The lawyer who appeared with petitioner before the Commissioner (R. 9), did not afterward represent him on trial (R. 4, 28) or on appeal (R. 57, 79).

Although the complaint alleged that petitioner violated 21 USC 174 on January 26, 1956, by receiving and concealing heroin imported illegally (Ex. 3, R. 13), the two-count indictment charged him with the revenue offense of purchasing heroin not in or from the original stamped package (R. 1) and with transferring illegally imported heroin (R. 2) on January 27, 1956. Petitioner has never been indicted for the offense charged in the complaint.

By the time of trial, the government abandoned the allegation regarding importation and moved to dismiss that count of the indictment (R. 29).

Although the government filed no answer to the motion to suppress (R. 3), the motion was overruled (R. 28), the heroin was admitted into evidence (Exs. 1A and 1B, R. 36) over repeated objections (R. 32, 34, 36, 44, 49), and petitioner was convicted of possession of untaxed narcotics

(R. 51). He was sentenced to eight years confinement and a $25.00 fine for violation of 26 USC 4704 (R. 53).

The Court of Appeals affirmed the conviction by a divided panel, the majority deciding that petitioner waived his right to object to the legality of the arrest when he waived preliminary hearing (R. 63-64). The dissenting judge said that, "The arrest and search of the appellant were, I think, clearly contrary to the provisions of the Fourth Amendment" (R. 66) and observed (R. 77):

> "No lawyer would dream (or so I think) that by failing to demand an apparently unnecessary preliminary hearing he had waived the right of his client, when charged with a different offense to object to the legality of his original arrest and the search that followed."

Summary of Argument

The opinion of the Court of Appeals authorizes arrests and searches in the unbridled discretion of government agents.

The only evidence of the offense for which the petitioner has been convicted was seized from him during an arrest based on a warrant. The warrant, in turn, was based on an affidavit which alleged, in the language of the statute, that petitioner had committed a different offense on the day before the arrest. No evidentiary facts were stated in the affidavit, as required by *Giordenello* v. *United States*, 287 US 124, 128.

The complaining witness (the arresting officer) testified that he had never seen petitioner violate any of the laws of the United States (R. 22). His complaint thus violated the constitutional requirement that an affidavit for a warrant must actually be based on personal knowledge. *United*

States v. *Longsdale*, 115 F. Supp. 489; *King* v. *Gokey*, 32 F. 2d 793, 795; *Schencks* v. *United States*, 2 F.2d 185, 186.

Because no facts were stated in the affidavit, and because only the arresting officer knew the insufficient facts available, the warrant was issued without the "informed and deliberate determinations" of a "neutral and detached magistrate", as required by *United States* v. *Lefkowitz*, 285 US 452, 464, and *Johnson* v. *United States*, 333 US 10, 14. Warrants obtained under such conditions come perilously close to the Colonial writs of assistance which placed "'. . . the liberty of every man in the hands of every petty officer'". *Boyd* v. *United States*, 116 US 616, 625.

The Fifth Circuit declined to decide whether the arrest was legal (R. 62). That Court concluded that petitioner waived his constitutional rights as to the offense for which he has been convicted by waiving preliminary hearing on the different offense for which he was arrested (R. 64).

"Waiver is the intentional abandonment of a known right, not a trick to catch one napping." *McKee* v. *McGhee*, 114 S.C. 183, 103 SE 508; *National Life & Acc. Ins. Co.* v. *Varner*, 171 Tenn. 95, 100 SW 2d 662, 664.

Petitioner could not know, when he waived preliminary hearing, that he would later be indicted for some different offense. Had he demanded a preliminary hearing, the Commissioner could have made no ruling which would have protected him from further prosecution based on the same evidence. *Collins* v. *Loisel*, 262 US 426, 429. After indictment, petitioner's lawyers filed a timely motion to suppress the evidence, a practice followed consistently during the 44 years since *Weeks* v. *United States*, 232 US 383, and now embodied in Rule 41(e) of the Federal Rules of Criminal Procedure.

To affirm this conviction on the doctrine of waiver is to set a trap inconsistent with the requirement that the Federal Rules of Criminal Procedure ". . . shall be construed to secure simplicity in procedure, fairness in administration and the elimination of unjustifiable expense and delay" (Rule 2).

ARGUMENT

I.

This Petitioner Was the Victim of a Patently Illegal Arrest; Evidence Seized From Him at That Time Should Not Be Admitted Against Him.

The most important question in this case was not decided by the Court of Appeals. Basing its opinion only on the doctrine of waiver, the majority below came to the conclusion that it was "unnecessary" (R. 62) to determine whether petitioner's arrest was lawful. The constitutional question was left in the status of problems ". . . which we discuss later but do not here decide . . ." (R. 64).

A. The Arrest Was Made on the Basis of a Warrant

The record makes it clear that this case involves an arrest sanctioned only by a warrant, if at all.

Describing the arrest during a hearing on petitioner's motion to suppress the evidence, Mr. Finley repeatedly admitted that he was executing the warrant when he arrested petitioner (R. 20, 21). At the U. S. Attorney's request, the judge took judicial notice ". . . that the defendant in this case was arrested on a complaint and warrant" (R. 37).

In its brief opposing the petition for certiorari, the government conceded that petitioner was arrested ". . . on the basis of the warrant . . ." (Br. 2) and that under law in effect at the time of the arrest Mr. Finley had no power to

arrest without a warrant on the facts in this record (footnote, Br. 5).[1]

B. The Complaint Did Not State the "Essential Facts" Necessary for Issuance of a Warrant

Although the Federal Rules of Criminal Procedure require that a complaint state, " . . . the essential facts constituting the offense charged" (Rule 3), the complaint in this case alleges no facts at all. The complaint merely outlines the legal conclusion of a narcotics agent that petitioner " . . . did receive, conceal, etc., narcotic drugs, to-wit: heroin hydrochloride with knowledge of unlawful importation in violation of Section 174, Title 21, United States Code" (Ex. 3, R. 13).

Such a complaint not only violates a procedural rule—it is in derogation of a right characterized as constitutional in the Federal courts.

> "It is, of course, axiomatic, that under Amendment 4 of the Constitution of the United States, facts must be alleged upon which the warrant is issued, as distinguished from conclusions." *United States* v. *Boscarino*, 21 F.2d 575, 576.

> " 'Probable cause', as used in the Fourth Amendment, fixes a legal standard and does not relate to a verbal

[1] The statute authorizing narcotics agents to serve warrants and to arrest without warrants upon "reasonable grounds" was not effective until July 18, 1956. *Narcotics Control Act of 1956*, sec. 104; Public Law 728, 84th Congress; 26 USC 7607. There is thus substantial doubt that Mr. Finley could be the "authorized officer" to whom the warrant was directed (R. 11). In 1953, the Seventh Circuit came to the conclusion that narcotics agents "by implication" had the power to execute warrants. *United States* v. *Jones*; 204 F.2d 745, 754, certiorari denied 346 US 854. The Supreme Court has never decided, however, that the execution of judicial process may be relegated to any person whose job makes it convenient. The fact that a female deputy Marshal was asked to sign the return on the warrant (R. 12), may indicate Mr. Finley's evaluation of his own powers.

expression. It connotes a legal conclusion to be drawn from a statement of, or the existence of, facts." *United States* v. *Wroblewski*, 105 F.2d 444, 446.

Since the days of Chief Justice Marshall, it has been settled that a warrant must be based on a sworn statement of fact. *Ex Parte Burford*, 3 Cranch 448, 453. More recently, this Court has held that:

> "A search warrant[2] may issue only upon evidence which would be competent in the trial of the offense before a jury (*Giles* v. *United States*, 1 Cir., 284 F. 208; *Wagner* v. *United States*, 8 Cir., 8 F.2d 581) and would lead a man of prudence and caution to believe that the offense had been committed. (*Steele* v. *United States*, 267 US 498, 504, 45 S.Ct. 464, 69 L.Ed. 757.)" *Grau* v. *United States*, 287 US 124, 128.

The detailed affidavits needed to win Supreme Court approval may be seen in *Steele* v. *United States*, 267 US 498, 500, and in *Dumbra* v. *United States*, 268 US 435, 440, in which the opinion significantly points out that:

> "The statements of fact contained in the affidavit are based on affiant's personal knowledge of what he saw; it sets forth evidentiary facts which, in our opinion, establish probable cause . . ."

Relying on cases dealing with sufficiency of indictments, the Fifth Circuit's majority found it:

---

[2] The Constitution suggests no difference between the form of affidavit required to obtain search and arrest warrants, since the Fourth Amendment is equally concerned with security of "persons, houses, papers, and effects." The cases emphasize that, "The Amendment protects the people against the seizure of their persons as well as against the search of their houses." *Wrightson* v. *United States*, 222 F.2d 556, 559; *Worthington* v. *United States*, 166 F.2d 557, 562; *Potts* v. *Rabb*, 141 F.2d 45, 46, footnote 1.

"... difficult to comprehend what more would be necessary to apprise Giordenello of the offense of which he was charged than the language of the statute here used in the complaint" (R. 64).

As the dissenting judge easily recognized (R. 67), "... that holding is a non-sequitur." The indictment-sufficiency cases deal with the Sixth Amendment right "... to be informed of the nature and cause of the accusation ..." Under the terms of that Amendment, this is a right which "... the accused shall enjoy ..." In this case, we are dealing with the personal responsibility of the magistrate to be satisfied that probable cause exists for an arrest under the Fourth Amendment, not with the right of a defendant to know why he is being tried.

Mr. Finley's affidavit no more supports a finding of probable cause by the commissioner than an indictment affords any basis for a verdict that a defendant is guilty. Both the commissioner and the judge were supposed to have evidence before them to support their decisions; accusation is not the equivalent of proof at any stage of proceedings under our Constitution.

It is not as though the insufficiency of the affidavit in this case posed some new, original question—the problem presented here has been settled for years.

Mr. Justice Bradley, acting as Circuit Justice in 1877, made it clear that "... the magistrate ought to have before him the oath of the real accuser ..." to "... judge for himself, and not trust to the judgment of another, whether sufficient and probable cause exists for issuing a warrant." *In Re Rule of Court*, 3 Woods 502, Fed. Cas. No. 12,126.

The cases so clearly establish petitioner's point in this regard that relevant excerpts from reported opinions have been assembled as Appendix "A" to this brief.

The sound reason for the rule that the affidavit must state facts is that, "Under our system of government, the accuser is not entitled to be the judge." *United States* v. *Harnich*, 289 F. 256, 261. "The finding of the legal conclusion of probable cause from the exhibited facts is a judicial function and it cannot be delegated by the judge to the accuser." *Veeder* v. *United States*, 252 F. 414, 418, certiorari denied 246 US 675. This Court has put it this way:

> "Absent some grave emergency, the Fourth Amendment has interposed a magistrate between the citizen and the police." *McDonald* v. *United States*, 353 US 451, 455.

No "grave emergency" can be found in a case in which the arresting officer admits that, ". . . there wasn't any particular reason to arrest the man at any particular moment or time after getting the warrant" (R. 22).

If a warrant may be issued on the basis of a bare allegation that a defendant has violated the law, unsupported by facts tending to prove the charge, there is no good reason to require warrants at all. The whole purpose of the Fourth Amendment is to protect citizens from the police through the "informed and deliberate determinations" of a "neutral and detached magistrate." *United States* v. *Lefkowitz*, 285 US 452, 464; *Johnson* v. *United States*, 333 US 10, 14.

This insurance against enthusiastic policemen means nothing if the affidavit in this case fills the bill. If the Commissioner is only required to place a formal imprimatur on someone else's evaluation of the evidence, we have returned to the days of writs of assistance, which placed "'. . . the liberty of every man in the hands of every petty officer.'" *Boyd* v. *United States*, 116 US 616, 625.

It is worth noting that the arresting officer testified that, "I had probable cause to believe that, yes" (R. 15). Al-

though the trial judge overruled a defense objection to the expression of this conclusion (R. 16), the best description of this comment is found in this Court's words: "The question is not whether he thought the facts to constitute probable cause, but whether the court thinks they did." *Director-General* v. *Kastenbaum*, 263 US 25, 28.

In this case, the U. S. Commissioner never had a chance to determine whether there was probable cause—or any cause—to arrest petitioner, since Mr. Finley gave the Commissioner no facts on which such a conclusion could be based. Indeed, in the state of this record, it may be concluded that the Commissioner simply abdicated from his duty, ". . . to reject a complaint and refuse a warrant of arrest unless satisfied that there is probable cause therefor." *United States* v. *Dolan*, 113 F. Supp. 757, 761.

C. The Commissioner Had No Jurisdiction to Issue a Warrant Because the Complaint Was Not Based on Personal Knowledge or Supported by Other Proof

Mr. Finley admitted that he never saw the appellant with any heroin hydrochloride (R. 16), or with any narcotics in his possession (R. 17). As a matter of fact, he conceded that he never saw petitioner violate any of the laws of the United States (R. 22).

This explains, of course, why Mr. Finley's affidavit stated no facts—Mr. Finley did not know any facts to state which would be relevant in establishing probable cause in the mind of the Commissioner. It also provides another basis for reversing this conviction, because a complaint which is not actually based on personal knowledge confers no jurisdiction on the Commissioner to issue a warrant. See *United States* v. *Longsdale*, 115 F. Supp. 489, in which the Court held an affidavit insufficient after a hearing revealed that

the complaining witness had no personal knowledge of the facts.

Clearly basing its decision on the Fourth Amendment, the Court of Appeals for the District of Columbia has said:

> "If the peace officer has reason to believe and does believe that a search or seizure ought to be made, he should state in his affidavit the facts which led him to that conclusion, and which were known to him of his own knowledge. If he has no first hand information as to the material facts, but has been informed by another as to facts or conditions which would justify the issuance of process for search or seizure, the officer should secure the informer's affidavit positively alleging of the latter's own knowledge the existence of such facts or conditions. In the event that the informer is unwilling to make such an affidavit, he should be subpoenaed to appear before the judge or commissioner to give testimony as to the truth of the statements made by him to the officer." *Schencks* v. *United States*, 2 F.2d 185, 186.

Far from making any attempt to get affidavits from his informants or to subpoena them, Mr. Finley made no effort to learn whether they were available to appear before the Commissioner (R. 19). Having made his own finding of probable cause (R. 15), Mr. Finley did not take the Commissioner into his confidence by listing the names of any witnesses on the affidavit (R. 13). He said, "I swore to the complaint myself on the basis of their information" (R. 18).

Viewing a similar complaint made under similar circumstances, the District Court for the Northern District of New York said:

> "This lack of personal knowledge was admitted upon the hearing. The complaint, therefore, becomes nothing more than a statement of the commission of a crime,

based on hearsay. Although made upon the personal oath of the complainant, it is in reality a complaint based upon information and belief and nothing more. The positive averments of an official as to facts not within his personal knowledge may be enough to protect the commissioner but they should not be sufficient to confer jurisdiction, in violation of the constitution and the numerous decisions of the courts. The complaint must, therefore, be held insufficient." *King* v. *Gokey*, 32 F.2d 793, 795.

Discussing this question, the court below decided that a complaint is sufficient if it merely "purports" to be on the knowledge of the affiant (R. 64), citing *Rice* v. *Ames*, 180 US 371 and *United States* v. *Walker*, 197 F.2d 287, 289.

Where *Walker* indicates that a complaint which only appears to be based on personal knowledge is sufficient, it relies solely on *Rice* v. *Ames*. That opinion, in turn, is a foreign extradition case in which the Supreme Court expressly found it necessary to depart from constitutional standards established for criminal cases because:

"... we are bound to assume that no foreign government possesses greater power than our own to order its citizens to go to another country to institute legal proceedings." (180 US at 375)

Extradition proceedings are *sui generis;* they are not criminal cases. See *Klein* v. *Mulligan*, 1 F. Supp. 635, 636, affirmed 50 F.2d 687, certiorari denied 284 US 665, and cases cited therein. The Federal Rules of Criminal Procedure do not apply to them. Rule 54(b)(5).

The Court below has thus decided that considerations peculiar to foreign extradition proceedings, which are based on the constitutional treaty power and in which eye-wit

nesses can seldom be produced, should control domestic criminal prosecutions in derogation of the Bill of Rights.

To decide that an affidavit for a warrant need only "purport" (R. 64) to be based on personal knowledge is to open the door to abuse of process. Applications for warrants are heard *ex parte*. Unless the constitutional affidavits must truthfully be based on personal knowledge which stands up later under cross-examination, anyone may obtain a warrant after recitation of an outright falsehood. Such a practice " . . . reduces the Fourth Amendment to a form of words." *Silverthorne Lumber Co.* v. *United States*, 251 US 385, 392.

D. If Mr. Finley Did Have Any Personal Knowledge About Petitioner, the Court Should Ignore Such Information Because It Was Not Stated in the Complaint

In its brief opposing the petition for certiorari, the government argued (Br. 4-5) that:

> "In this case, Agent Finley had ample basis . . . for a sworn complaint that the petitioner possessed narcotic drugs."

Petitioner does not concede that personal knowledge of the commission of any crime can be read into Mr. Finley's admission that he never saw petitioner violate any of the laws of the United States (R. 22).

Nevertheless, even if Mr. Finley did have enough information to add up to probable cause, such information should not be considered in support of the arrest. The question here is not whether Mr. Finley possessed enough information to ask for a warrant; the question is whether the Commissioner was given enough information to issue one.

The Federal Rules of Criminal Procedure require that the complaint contain "the essential facts constituting the offense charged." (Rule 3) Then, "If it appears from the complaint that there is probable cause . . .", the warrant may issue. (Rule 4)

As the dissenting judge below observed (R. 70):

> "Thus, 'probable cause' must appear 'from the complaint' itself, and the 'essential facts' must be stated in the complaint. In the safeguarding of such fundamental human rights the rules wisely leave nothing to speculation nor to oral testimony as to what was before the commissioner."

Cases long antedating the present rules held that, "The Constitution means . . . that the grounds of issuance shall be disclosed at the time of issue" and that " . . . the affidavit must be self-sufficient, and cannot be bolstered up by oral testimony." *United States* v. *Casino*, 286 F. 976, 978; *Polido* v. *United States*, 55 F.2d 866, 868. See *United States* v. *Nichols*, 89 F. Supp. 953, 955, for a similar expression regarding affidavits for search warrants under Rule 41.

Mr. Finley's "information" does not really help the government's case. He said he heard that petitioner "planned to go to Chicago, Illinois, to bring back a large supply of heroin" (R. 18) and claimed that petitioner stated, after the arrest, " . . . that he had received the heroin in Chicago . . ." (R. 35). The statute (26 USC 4704) makes it an offense only to "purchase, sell, dispense or distribute narcotic drugs . . ." The indictment alleges purchase and possession of narcotics (R. 1). Possession is not an offense and is relevant only as a basis for the statutory presumptions, which are rebutted in this case by Mr. Finley's testimony regarding acquisition in Chicago. Thus none of the acts necessary to constitute an offense under the statute were proved, unless to "bring back" or to "receive" means to "purchase". Even so, the prosecution should fail because any purchase must have taken place in the Northern District of Illinois, not the Southern District of Texas. Questions of venue raise "deep issues of public policy" *United States* v. *Johnson*, 323 US 273, 276, which were adequately presented to the trial court by petitioner's motion for a "directed verdict" (R. 50). *United States* v. *Jones*, 174 F.2d 746, 748.

II.

By Waiving Preliminary Hearing, Petitioner Did Not Waive His Right to Have Illegally Obtained Evidence Excluded From the Record at His Trial.

Declining to decide whether the defects in the complaint rendered the warrant void (R. 62), the Fifth Circuit affirmed this conviction by concluding (R. 64):

> "... that the waiver by appellant of the preliminary examination constituted a waiver of any such defects, and that he will not be permitted to raise the issues by motion later."

There are many cogent reasons why this holding should be reversed.

A. The Doctrine of Waiver Cannot Apply Under the Particular Facts in the Case at Bar

The validity of this arrest should be decided without regard to any claim of "waiver" because petitioner was never offered—and thus could not have waived—a preliminary hearing as to the offense for which he now stands convicted.

The complaint on which preliminary hearing was waived charged that on January 26, 1956, petitioner received and concealed narcotic drugs with knowledge of unlawful importation, a violation of 21 USC 174 (Ex. 2, R. 11). The indictment on which the conviction is based charges that on a different day (the day of the arrest) he purchased narcotics not in or from the original stamped package, in violation of 26 USC 4704 (R. 1).

It is all very well to state, in the language of the Fifth Circuit (R. 64), that:

"... it is difficult to comprehend what more would be necessary to apprise Giordenello of the offense of which he was charged than the language of the statute here used in the complaint."

The fact remains that the "language of the statute here used in the complaint" was not and is not the language of the statute on which this conviction is based.

A defendant will need extraordinary prescience if his actions in one case forever forfeit fundamental constitutional rights as to all offenses of which he may be accused in the future. Waiver is usually defined as "the intentional relinquishment of a known right." 92 CJS Waiver, p. 1041; 56 Am. Jur. Waiver, Sec. 2, p. 102; and cases cited therein. A defendant can hardly possess "known rights" as to a prosecution not yet commenced.

Recognizing that the basis for a man's decisions can change from case to case, the Fifth Circuit held twice in 1952 that the Fifth Amendment privilege against self-incrimination "... attaches to the witness in each particular case in which he is called upon to testify, without reference to his declarations at some other time or place or in some other proceeding." *Poretto* v. *United States*, 196 F.2d 392, 394; *Marcello* v. *United States*, 196 F.2d 437, 444-445.

Since the Fourth Amendment and the self-incrimination clause of the Fifth Amendment are designed to protect the same fundamental rights (*Boyd* v. *United States*, 116 US 616, 633), the same restrictions against waiver should apply to questions arising under each. Petitioner's tactics in a customs case, in which no indictment has yet been returned, should not rescue the government's internal revenue conviction.

B. U. S. Commissioners Have Neither the Power Nor the Ability to Decide the Questions Which the Fifth Circuit's Opinion Would Force Upon Them

Even aside from the particular facts in this record, petitioner argues that waiver of preliminary examination does not amount to consent to an arrest.

The federal practice of excluding evidence obtained illegally has been described as " . . . a judicially created rule of evidence . . . " (concurring opinion of Mr. Justice Black in *Wolf* v. *Colorado*, 228 US 25, 40) and this nation's judicial power is vested only in its courts (Art. III, Section 1, United States Constitution).

The very case which gave its name to the federal exclusionary rule makes it clear that enforcement of the Fourth Amendment is the peculiar province of the judiciary:

> "To sanction such proceedings would be to affirm by judicial decision a manifest neglect, if not an open defiance, of the prohibitions of the Constitution, intended for the protection of the people against such unauthorized action." *Weeks* v. *United States*, 232 US 383, 394.

The Fifth Circuit itself has recognized that:

> "When . . . officers of the federal government break the Federal Constitution to get at the truth, the federal courts refuse to hear it." *Foley* v. *United States*, 64 F. 2d 1, 4.

The meaning and importance of the legion of federal cases dealing with the *Weeks* doctrine is that our constitutional rights can be effectively protected only by the courts. See *Beisel*, Control Over Illegal Enforcement of the Criminal Law: The Role of the Supreme Court, Vol. XXXIV,

No. 4, and Vol. XXXV, No. 1, Boston University Law Review.

Implicit in the Fifth Circuit's opinion is the concept that the Commissioner could have taken some conclusive action had the arrest been challenged before him. If the Commissioner's decision is so important that it binds either the prosecution or the defense, the responsibility of the judiciary for defense of the Constitution (described as an "almost sacred" duty by Judge Rives below, R. 66) is subordinated to the best guess of "inferior officers" (*Go-Bart Importing Co.* v. *United States*, 282 US 344, 352) who "... are not and do not hold United States Courts." *In Re Perkins*, 100 F. 950, 954. See *Todd* v. *United States*, 158 US 278, 283; *United States* v. *Berry*, 4 F. 779, 780; *Ex Parte Perkins*, 29 F. 900, 909-910; *In Re Film, Etc., of Dempsey-Tunney Fight*, 22 F.2d 837, 839.

What would have happened if the petitioner had demanded a preliminary hearing? He would either have been bound over to the grand jury (as he was without the hearing) or he would have been discharged from custody.

If bound over to the grand jury, and if indicted, petitioner should still have filed a motion to suppress evidence in the District Court, under Rule 41(e) of the Federal Rules of Criminal Procedure. He would have gained nothing by demanding the preliminary hearing.

If discharged from custody by the Commissioner, petitioner could nevertheless have been re-arrested or indicted, since the Commissioner's decision is not *res judicata*. *Ex Parte Milburn*, 9 Pet. 704, 710; *Morse* v. *United States*, 267 US 80, 84-85; *United States* v. *Fogel*, 22 F.2d 823, 825; *Burrall* v. *Johnson*, 53 Supp. 126, 129, affirmed 146 F.2d 230, certiorari denied 325 US 887. No ruling which a Commissioner might make in petitioner's favor would protect him

from further prosecution based on the same evidence. *Collins* v. *Loisel*, 262 US 426, 429.

This Court makes it clear that:

> "No procedural principle is more familiar to this Court than that a constitutional right may be forfeited in criminal cases as well as in civil cases by the failure to make timely assertion of the right *before a tribunal having jurisdiction to determine it.*" *Yakus* v. *United States*, 321 US 414, 444. (Emphasis added.)

That is exactly the point in this case. The Commissioner did not have jurisdiction to "determine"—or end, finally—the matter under consideration. "The sole express authority for a pre-trial suppression of evidence by any court other than a trial court is found in Rule 41e." *United States* v. *Klapholz*, 230 F.2d 494, 496.

The problem may best be summed up in the words of the dissenting judge below (R. 77):

> "No lawyer would dream (or so I think) that by failing to demand an apparently unnecessary preliminary hearing he had waived the right of his client when charged with a different offense to object to the legality of his original arrest and the search that followed."

Before suggesting that federal judges should surrender to United States Commissioners their responsibility for enforcement of the Fourth Amendment, it would be well to examine the Commissioners' qualifications to decide such questions.

The latest authoritative information about these officials seems to be the report of the Committee on United States Commissioners to the Judicial Conference of Senior Circuit Judges, dated June 28, 1943, filed in the Administrative Office of the United States Courts.

This report states (p. 7) that, " . . . of some 1,080 commissioners about one-half are laymen." The very fact that the case at bar has reached the Supreme Court demonstrates that constitutional rights are at least subtle enough that their enforcement should not depend on a 50-50 chance of reaching a lawyer. (See the arguments of counsel on the dangers of leaving fundamental rights to the mercy of inferior tribunals in *Ex Parte Bollman* and *Ex Parte Swarthout*, 4 Cranch 75, 89-90.)

There are cases holding that denial of the right to counsel at a preliminary hearing does not infect a subsequent trial with reversible error. *Burrall* v. *Johnson*, *supra*, 53 F. Supp. 126, affirmed 146 F.2d 230, certiorari denied, 325 US 887. The *Weeks* doctrine is in sad straits if a man is bound by failure to raise difficult legal objections, without a lawyer's assistance, at a hearing before an official who may also be a layman.

The Fifth Circuit bases (R. 62-63) its theory of waiver on *United States* v. *Walker*, 197 F.2d 287, certiorari denied 344 US 877, which holds (197 F.2d at 289) that:

> " . . . waiver of examination and consent to removal would, in our opinion, preclude a later assertion that the complaint was not sustained by legally competent evidence."

This Court's denial of certiorari does not amount to sanction of *Walker*, since denial of a writ of certiorari imports no expression of opinion on the merits of the case. *Brown* v. *Allen*, 344 US 443, 489-497, and cases cited therein. Petitioner contends, quite simply, that the Second Circuit was wrong in Walker, for the reasons stated in this brief and for the reasons stated by the dissenting judge in the Court of Appeals (R. 73-76).

C. Petitioner Called the Trial Court's Attention to His Illegal Arrest by Following the Precise Method Provided by the Federal Rules of Criminal Procedure

It becomes almost ludicrous to suggest that petitioner actually waived any objection to his illegal arrest, in the face of the recognized presumption that constitutional rights have not been waived. *Hodges* v. *Easton*, 106 US 408, 412; *Ohio Bell Tel. Co.* v. *Public Utilities Commission*, 301 US 292, 306; *Aetna Ins. Co.* v. *Kennedy*, 301 US 389, 394; *Johnson* v. *Zerbst*, 304 US 458, 464; *Glasser* v. *United States*, 315 US 60, 70; *Smith* v. *United States*, 337 US 137, 150; *Emspak* v. *United States*, 349 US 190, 198.

In bringing petitioner's constitutional objections before the trial court, his lawyers followed the customary procedure approved in *Weeks* v. *United States*, 232 US 383, and now embodied in Rule 41(e) of the Federal Rules of Criminal Procedure. They moved, before trial, to suppress the evidence (R. 2).

Rule 41(e) particularly provides for a motion to suppress evidence on the ground that "there was not probable cause for believing the existence of the grounds on which the warrant was issued." In its brief in opposition to the petition for certiorari in this case the government said:

> "We do not argue, however, that, by waiving preliminary hearing, a defendant so far accepts the validity of the arrest that he is precluded from asserting that the arrest was without sufficient probable cause to meet Fourth Amendment requirements governing a search incident to an arrest" (Br. 4).

As demonstrated in Section I of the argument portion of this brief, Mr. Finley's affidavit did not establish probable

cause because it did not state evidentiary facts and because it was not based on personal knowledge.

"Waiver is the intentional abandonment of a known right, not a trick to catch one napping." *McKee* v. *McGhee*, 114 S.C. 183, 103 SE 508; *National Life & Acc. Ins. Co.* v. *Varner*, 171 Tenn. 95, 100 SW 2d 662, 664.

Considering:

(1) the presumption against waiver of constitutional rights,

(2) the established practice during the 44 years since *Weeks*,

(3) the specific provisions of Rule 41(e),

(4) the fact that the hearing which was waived did not pertain to the case now on appeal, and

(5) the fact that the Commissioner had no jurisdiction to give petitioner any final relief, the opinion below creates only a "trick to catch one napping."

This clearly violates the requirement that the Federal Rules of Criminal Procedure, " . . . shall be construed to secure simplicity in procedure, fairness in administration and the elimination of unjustifiable expense and delay" (Rule 2). If "adjudication on the merits" is the "motivating policy" of the present rules (*United States* v. *Claus*, 5 FRD 278, 280), the practice demanded by the Court of Appeals falls far short of the goal.

It is important to note that petitioner's case at the pretrial hearing was based entirely on Mr. Finley's testimony (R. 15-26). Mr. Finley was an essential, necessary government witness at the trial and was called by the prosecution as such (R. 30). There was never any controversy about the facts; the case which petitioner made out at the pre-

trial hearing was the case on which the government relied at the trial.

Even a motion to suppress evidence is ordinarily necessary only to satisfy the rule of convenience that, " . . . courts in criminal trials will not pause to determine how the possession of evidence tendered has been obtained." *Gouled* v. *United States*, 255 US 298, 312; see *Weeks* v. *United States*, 232 US 383, 396. The pre-trial motion and hearing have been held unnecessary when there is no factual conflict to be settled; this Court has reversed convictions based on evidence seized illegally:

(1) when the motion to suppress was not filed until after the jury was impanelled (*Amos* v. *United States*, 255 US 313, 316),

(2) when objection was made at the time of introduction of the tainted proof after a pre-trial motion to suppress had been overruled (*Gouled* v. *United States*, *supra*, 255 US 298, 312), and

(3) when the defense made no pre-trial motion and first objected to the evidence at the time of its introduction (*Agnello* v. *United States*, 269 US 20, 34).

The gist of these decisions is that:

> "Where, by uncontroverted facts, it appears that a search and seizure were made in violation of the 4th Amendment, there is no reason why one whose rights have been so violated, and who is sought to be incriminated by evidence so obtained, may not invoke protection of the 5th Amendment immediately and without any application for the return of the thing seized. 'A rule of practice must not be allowed for any technical reason to prevail over a constitutional right.'" *Agnello* v. *United States*, *supra*, 269 US 20, 34.

In *United States* v. *Asendio*, 171 F.2d 122, 125, the Third Circuit reversed a conviction when the illegal search was first questioned in a motion for new trial. Judge Holtzoff (Secretary to the Supreme Court's Advisory Committee on the Rules of Criminal Procedure) recently held in *United States* v. *Watson*, 146 F. Supp. 258, 259, that a motion to suppress evidence was timely when first presented at a third trial for the same offense.

In the light of *Amos*, *Gouled*, *Agnello*, *Asendio* and *Watson*, *supra*, petitioner earnestly submits that his vigorous objections cannot be tortured into waiver.

D. The Practical Effect of the Opinion Below Is to Deprive Most Defendants of the Opportunity for Full Exercise of Constitutional Rights

The realities of criminal practice neither comprehend nor permit the procedure which will be forced upon the federal courts if the opinion below is affirmed.

If *McNabb* v. *United States*, 318 US 332, did not convince federal agents that their prisoners have a right to an immediate hearing, *Mallory* v. *United States*, 354 US 449, should certainly put the point across. The beneficent effect of these decisions will be destroyed if a defendant may demand a prompt hearing only when prepared to present his case immediately in final form.

"Wise adjudication has its own time for ripening." *Maryland* v. *Baltimore Radio Show*, 338 US 912, 918. So does competent advice of counsel. Sufficient time to prepare a case is an element of the constitutional right to Assistance of Counsel. United States Constitution, Amendment VI; *Powell* v. *Alabama*, 287 US 45, 71. Few cases are ready for trial in time for a hearing held the day after the arrest, as in this case (R. 9). Few able criminal lawyers are available to try cases on a moment's notice.

Although the Rules of Criminal Procedure require the Commissioner to give a prisoner "reasonable time and opportunity to consult counsel" (Rule 5b), it is not enough to suggest that a client who is entitled to bail should be bound by the strategy of a lawyer selected from jail.

Impairment of the Eighth Amendment right to reasonable bail can destroy other constitutional rights, including the right to make an intelligent selection of counsel. *Kraft* v. *United States*, 238 F.2d 794, 799. A prisoner who needs counsel to save complex legal objections before bail is set, although he can often retain counsel of his own choice only after release on bail, is on a hopeless merry-go-round.

The fact that petitioner had a lawyer at his side before the Commissioner (R. 9) only proves that these problems are real. The lawyer who appeared at the preliminary hearing did not appear thereafter. Different attorneys, chosen after time for reflection and preparation, represented petitioner at the hearing on the motion to suppress (R. 4), on trial (R. 28) and on appeal.

There are other serious implications in the opinion below.

If issues may be raised on trial only when raised in the preliminary hearing, it will be important to determine just what objections were brought to the Commissioner's attention. Official court reporters are required (28 USC 753b) only to attend, "at each session of the court and at every other proceeding designated by rule or order of the court or by one of the judges." Counsel for petitioner knows of no district in which official reporters are required to attend preliminary examinations.

Under these circumstances, trial and appellate courts will be faced with an unending succession of cases in which the chief issue will be a battle between witnesses seeking to establish whether or not particular objections were actually

raised before Commissioners. It takes little imagination to discern that this will be an unrewarding, time-consuming, and often futile task.

Another problem is that any practice which requires a defendant to submit to a "dry run" in advance of trial may well offend the constitutional prohibition against double jeopardy. United States Constitution, Amendment V. See *Ball* v. *United States*, 163 US 662, 669, holding that "The prohibition is not against being twice punished, but against being twice put in jeopardy . . ."

Proceedings at which a defendant's rights may be finally established certainly approach anyone's concept of jeopardy.

CONCLUSION

"An arrest may not be used as a pretext to search for evidence." *United States* v. *Lefkowitz*, 285 US 452, 467.

It is apparent that the warrant in this case was used only as an "investigative technique," as Mr. Finley admitted (R. 22). It was not, and was never intended to be, the preliminary step in an honest prosecution for an offense committed prior to the time the warrant was obtained, as is demonstrated by the fact that petitioner has not to this day been indicted for the offense alleged in Mr. Finley's complaint.

"Strictly speaking, a complaint . . . is an accusation . . . recognized as one of the methods of commencing a criminal prosecution in the federal courts." *Cyclopedia of Federal Procedure*, 3rd Ed., 1952, Vol. 11, Sec. 40.04. "The arrest of the offender, followed by and coupled with a preliminary hearing, are the inceptive acts and the beginning of the exercise of criminal jurisdiction and procedure . . ." Longs-

dorf, *The Beginnings and Background of Federal Criminal Procedure*, Barron and Holtzoff, *Federal Practice and Procedure*, Rules Edition, 1951, Vol. 4, p. 16. "Arrest for trial is a proceeding which belongs to the judicial, not to the executive branch of the government . . ." The Power to Cause an Arrest, 1 Op. Atty. Gen. 229, Sept. 8, 1818.

In other words, a warrant is not a weapon to be loaded with blank ammunition for use in a legal ambush. It is a court order, issued to a named, authorized public official, commanding him to find a particular person who is to be brought before the Court to answer for a particular offense. No matter how much policemen would enjoy the use of judicial process as an "investigative technique" (R. 22), our Constitution requires wary vigilance in consideration of a search based on an arrest made when " . . . there wasn't any particular reason to arrest the man at any particular moment or time after getting the warrant" (R. 22).

In 1948, Judge McAllister, of the Court of Appeals for the Sixth Circuit, pointed out the dangers inherent in proceedings such as these, stating, in *Worthington* v. *United States*, 166 F.2d 557, at 568:

> "We have heard enough in these last years, throughout the world, of the knock on the door in the nighttime, the arrest, the ransacking search, and the prison cell, to take warning. The constitutional rights of everyone are immediately imperiled when the rights of even the outcast, the disdained and the powerless, are trampled over with impunity. Violation of the safeguards, guaranteed by the Bill of Rights, is not to be trifled with, or lightly considered, no matter who the victim be. Such abuse must be struck down, without palliation, in its beginning."

For the reasons stated, this Court should reverse this conviction. Since the only proof of the offense alleged is evidence which was seized illegally, there is no reason for further proceedings. This Court should direct the entry of a judgment of acquittal as permitted by Section 2106 of Title 28, United States Code.

Respectfully submitted,

WILLIAM F. WALSH
William F. Walsh
Counsel for Petitioner
1116 Capitol Ave.
Houston 2, Texas

APPENDIX "A"

(The following quotations are from opinions which make it clear that the Fourth Amendment is satisfied by nothing less than affidavits which set forth evidentiary facts actually based upon personal knowledge.)

In 1922, the First Circuit Court of Appeals examined an affidavit just like Mr. Finley's and observed:

> "The fact that Lordan's affidavit was not in form on information and belief, and that he bravely swore that Giles had illegal possession of intoxicating liquor, does not make his statement legal evidence of facts. It is not enough that the form of this affidavit leaves it possible that the affiant might have personal knowledge as to the possession of intoxicating liquor and as to facts tending to show that such possession was illegal. It should have affirmatively appeared that he had personal knowledge of facts competent for a jury to consider, and the facts, not his conclusions from the facts, should have been before the commissioner." *Giles* v. *United States*, 284 F. 208, 214.

Quashing a search warrant because of an insufficient affidavit, the Seventh Circuit Court of Appeals stated:

> "No search warrant shall be issued unless the judge has first been furnished with facts under oath—not suspicions, beliefs or surmises—but facts, which, when the law is properly applied to them, tend to establish the necessary legal conclusion, or facts, which, when the law is properly applied to them, tend to establish probable cause for believing that the legal conclusion is right." *Veeder* v. *United States*, 252 F. 414, 418, certiorari denied 246 US 675.

The Sixth Circuit, in 1927, said:

> "The search warrant now involved was issued upon an affidavit, the sufficiency of which must be tested by its statements of fact rather than by its conclusions.

> We therefore disregard the allegation made in terms that the premises were being used for business purposes and for the sale of intoxicating liquor, and look only to the circumstances expressly stated." *Kasprowicz* v. *United States*, 20 F.2d 506, 507.

The District Court for the Eastern District of Louisiana put it this way in 1928:

> "The facts sworn to in the affidavit, and not the conclusions of the affiant; nor the evidence disclosed by the search, must determine whether the rights guaranteed Cangemi by the Fourth and Fifth Amendments of the Constitution were invaded under this particular warrant. *United States* v. *A Certain Distillery*, 24 F.2d 557, 558.

The Fourth Circuit, in 1937, stated flatly that:

> "The warrant under which the officers acted, not being supported by affidavit showing facts constituting probable cause for the belief that liquor was possessed on the premises in violation of law, did not meet the requirements of the Fourth Amendment to the Constitution." *Sutherland* v. *United States*, 92 F.2d 305, 307.

Reviewing a customs case in 1938, the Second Circuit took one look at an affidavit which merely tracked the statute, as did Mr. Finley's, and said:

> "Relying upon the Fourth Amendment to the Constitution, the appellant contends that the search warrant was illegal because Pike's affidavit showed no facts upon which to base a finding of probable cause. Such generalities as appear in his affidavit were clearly no justification for issuance of the warrant . . . " *In Re No. 32 E. 67th St.*, 96 F.2d 153, 155.

The conscientious reasoning of Judge George A. Welsh came up with this answer in 1940:

> "Was the search and seizure invalid? That is to say, was the supporting warrant itself supported by sworn

facts competent to be submitted to a jury, as reasonably affording probable cause for believing that seditious or subversive matter was to be found at the headquarters of the Communist Party at 250 S. Broad Street? This is the standard by which the validity of the search and seizure is to be tested." *Reeve* v. *Howe*, 33 F. Supp. 619, 622.

CERTIFICATE OF SERVICE

I certify that a copy of the above and foregoing brief was mailed to the Solicitor General, Department of Justice, Washington 25, D. C., this 11th day of February, 1958, air mail postage prepaid.

William F. Walsh
William F. Walsh
1116 Capitol Ave.
Houston 2, Texas
Counsel for Petitioner